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PRECISION VALVE & AUTOMATION, INC.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RUBEN JUAREZ, an individual and  
ISELA HERNANDEZ, an individual,

CASE NO. CV17-03342-ODW (GJSX)  
[L.A.S.C. Case No. BC650229]

## Plaintiffs,

PRECISION VALVE &  
AUTOMATION, INC., a corporation  
and DOES 1-20,

**DEFENDANT PRECISION VALVE  
& AUTOMATION, INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

## Defendants.

Date: October 1, 2018  
Time: 1:30 p.m.  
Ctrm: 5D, 5<sup>th</sup> Floor  
Judge: Hon. Otis D. Wright II

\*This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on July 16, 2018. (Catalona Dec., 9:9-17, 690-694.)

\*\*Defendant requests oral argument on this motion for summary judgment.

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## I. INTRODUCTION

Plaintiffs' lawsuit is unquestionably barred by the statute of limitations because although they knew the basis for their claims in 2012, they did not file their complaint until 2017, long after the two-year period of limitations had expired.

And in 2014, also more than two years before suit was filed, plaintiff Ruben Juarez (“Juarez” or “plaintiff”) filed his workers’ compensation action for the same injuries caused by the same chemicals plaintiffs allege against Precision Valve & Automation, Inc. (“PVA”) in this case. In the workers’ compensation action, plaintiff attributed his symptoms—migraine headaches, dizziness, difficulty walking and sinus symptoms—to exposure from PVA’s machine which he complained was “hazardous” because it lacked an alarm to warn users when the exhaust system was not in operation. This is the same product defect claim alleged in the complaint against PVA.

Plaintiffs have no explanation for why their lawsuit was filed after their statutory deadline expired. They suggest they were unaware that the chemicals used in the machine were hazardous until Juarez’s attorneys obtained Material Safety Data Sheets (“MSDS”) in May, 2015. But these same MSDS sheets were always available on the computer which sat on plaintiff’s desk at SpaceX, as well as in a three-ring binder a few feet away. According to his department supervisor, Juarez regularly used these same MSDS sheets as part of his job from 2012 to 2014. Clearly, Juarez knew at the time that the chemicals he was using were hazardous, and the MSDS sheets are just a strategy to avoid having his untimely lawsuit dismissed.

But even if this explanation is accepted for the sake of argument, it is beyond dispute that plaintiffs did not exercise reasonable diligence in determining the cause of their injuries. In verified responses to interrogatories, plaintiffs admitted that they never tried to determine the cause of their injuries that started in 2012, *even after filing their workers' compensation action in 2014*, which by itself is

1 “definitive proof” under California law that they knew the basis for their claims at  
 2 that time. Plaintiffs or their attorneys could have easily asked SpaceX to provide  
 3 the MSDS sheets, either before or after Juarez left his job, or they could have just  
 4 downloaded them from any number of websites online. Summary judgment is  
 5 required because the incontrovertible evidence shows that plaintiffs were required  
 6 to file their lawsuit no later than October of 2014, and that when it was  
 7 eventually filed in 2017, it was barred, indisputably, by the 2-year statute of  
 8 limitations.

9 The Court should also grant partial summary judgment on plaintiffs’ failure  
 10 to warn claims, and strict product liability claim which are also prohibited as a  
 11 matter of law.

12 **II. STATEMENT OF FACTS**

13 **A. The Parties**

14 Plaintiffs reside in Granada Hills, California, in the County of Los Angeles.  
 15 (Please see PVA’s Separate Statement of Uncontroverted Facts (“UF”) 1.) PVA is  
 16 headquartered and incorporated in the State of New York. (UF 2.)

17 **B. The PVA 350**

18 The PVA 350 is a conformal coating machine manufactured by PVA which  
 19 is known in the industry as a “workcell.” (UF 3.) PVA sold a single PVA 350 to  
 20 SpaceX in 2009. (UF 4.) This machine coats printed circuit boards with a thin  
 21 polymeric film that “conforms” to the board’s contours to protect against moisture,  
 22 dust, chemicals and temperature extremes. (UF 5.) When it was manufactured,  
 23 SpaceX specified that the machine would spray Electrolube “NVOC,” a 100%  
 24 solids content material that did not contain solvent material (such as Humiseal or  
 25 Arathane.) (UF 6.)

26 In any event, the PVA 350 was built with safety features to prevent users  
 27 from breathing materials used inside the machine. First, the machine monitored its  
 28 exhaust flow and turned off if the exhaust system was not operating. (UF 7.) As

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1 stated in the manual provided to SpaceX in 2009, it “must exhaust at a rate of no  
 2 less than 150 cubic feet per minute, otherwise a critical fault will occur shutting the  
 3 motors down.” (UF 8.) Second, the machine is a closed system with a door and  
 4 negative air pressure to prevent chemicals from escaping. (UF 9.) If the door of  
 5 the machine is opened, the spraying of materials will stop. (UF 10.) “When the  
 6 door is opened power to the motors and pneumatics is disconnected.” (UF 11.)  
 7 Third, the machine cannot be operated until a machine safety check is performed  
 8 which ensures that all safety features are working properly: “The machine safety  
 9 check ensures the workcell safety devices (emergency stop, door interlocks, light  
 10 curtain, etc.) are operating properly. During startup, the operator must enter the  
 11 safety check and complete it successfully. Otherwise the machine halts all  
 12 operations.” (UF 12.)

13 The machine’s manual lists all of these features and explicitly warn users not  
 14 to “disable the safety features of the machine.” (UF 13.) It also states: “NOTE:  
 15 The safety features should NEVER be bypassed, disabled or tampered with.  
 16 Precision Valve & Automation, Inc. is not responsible for any damages incurred,  
 17 mechanical or human, because of alteration or destruction of any safety features.”  
 18 (UF 14.) “Operation of your workcell involves, air pressure, electrical power and  
 19 mechanical devices *and the use of Hazardous materials....* There are no dangerous  
 20 materials or chemicals used in the operation of the machine *except for the required*  
 21 *application material.* The application material *should include a Material Safety*  
 22 *Data Sheet (MSDS), which specifies known dangers and toxicity.”* (UF 15  
 23 (emphasis added).) Juarez testified that when he worked at SpaceX he never  
 24 looked at this manual or asked to look at this manual for the PVA 350. (UF 16.)

### 25 C. SpaceX

26 SpaceX is a designer and manufacturer of advanced rockets and spacecraft.  
 27 (UF 17.) After purchasing the PVA 350 in 2009, SpaceX did not begin to use  
 28 Humiseal or Arathane materials, which were not originally specified for the

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1 machine, until 2012 at the earliest. (UF 18.) When SpaceX originally began using  
 2 these chemicals, numerous employees from the Avionics department were brought  
 3 together to determine the appropriate formulation of Arathane and Humiseal  
 4 materials for SpaceX's conformal coating applications. (UF 19.) These employees  
 5 included Ruben Juarez who Avionics Department supervisor Gregory Maxwell  
 6 testified hand-mixed experimental and test batches of Arathane and Humiseal to  
 7 make different formulations. (EX. 20.) Before hand-mixing these materials, Juarez  
 8 reviewed the MSDS sheets for Arathane and Humiseal to ensure they cured and  
 9 "set up" properly so SpaceX's desired result was achieved. (UF 21.)

10 The Avionics Department also required workers who used the PVA 350,  
 11 including Juarez, to follow SpaceX's "Standard Operating Procedures" entitled  
 12 "Avionics Standard Operating Procedure: Polymeric Application of Electronic  
 13 Assemblies." (UF 22.) These Standard Operating Procedures ("SOPs") instructed  
 14 SpaceX employees to use a facemask and operate the machine in a well-ventilated  
 15 area, pursuant to instructions in MSDS sheets for the specific coating materials that  
 16 were used in the machine. (UF 23.) These SOPs also specified that the machine's  
 17 coating materials included Humiseal 1A33 conformal coating and Humiseal 521  
 18 thinner. (UF 24.) These SOPs also instructed SpaceX employees to "[p]rogram the  
 19 machine per operating instructions in the PVA Manual." (UF 25.) SpaceX  
 20 maintained copies of all manufacturer manuals and specifications for its purchased  
 21 equipment including the PVA 350. (UF 26.)

22 **D. Ruben Juarez**

23 Ruben Juarez worked as a programmer at SpaceX from January, 2012 to the  
 24 end of March, 2014. (UF 27.) During this entire period, his job duties never  
 25 changed. (UF 28.) Juarez testified that his job was to program the PVA 350, for  
 26 which he was its "main support." (UF 29.) Plaintiffs also admitted in their  
 27 complaint that "[d]uring Plaintiff Ruben Juarez's time at Space X, Plaintiff Ruben  
 28 Juarez was *in charge of* programming the PVA 350 to spray Arathane 5750A,

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1 Arathane 5750B, Arathane 5750 A/B, and Humiseal thinner.” (UF 30 (emphasis  
 2 added).)

3       This required Juarez to spend 60% of his time inside the conformal coating  
 4 room which housed the machine. (UF 31.) He testified that he was actually  
 5 required to work *inside the machine* itself to verify the appropriate thickness of the  
 6 coatings sprayed on SpaceX components. (UF 32.) Throughout his time with  
 7 SpaceX, he worked with one of the conformal coating materials, Humiseal thinner  
 8 521, on a daily basis. (UF 33.) Later, he also programmed other machines called  
 9 “SMT” or “pick and place” machines, but he did not know when this work began  
 10 during his more than two years at SpaceX. (UF 34.)

11       **E. The Alleged Injuries**

12       Mr. Juarez testified that within “two weeks” after starting at SpaceX, he  
 13 began to be exposed to “toxic chemicals” when he started programming the PVA  
 14 350. (UF 35.) Then, in August or September of 2012, he started getting migraine  
 15 headaches, dizziness, sinus symptoms and difficulty walking. (UF 36.) In the  
 16 complaint, plaintiffs allege that starting in June, 2012, Juarez had “over 9  
 17 hospitalizations” and “at least 21 visits to urgent care/emergency room for  
 18 symptoms associated with toxic chemical exposure.” (UF 37.)

19       He told neurologist Isaac Regev, M.D., that “almost from the beginning he  
 20 noted frequent headaches at work which he felt was associated with exposure to  
 21 various chemicals.” (UF 38.) He made similar statements to psychologist Gayle K.  
 22 Windman, Ph.D.: “*A few months after he began working at SpaceX, Mr. Juarez*  
 23 *developed symptoms of migraine headaches, dizziness, difficulty walking and sinus*  
 24 *symptoms due to exposure to electronic materials such as tin and lead; chemical*  
 25 *coatings such as Arathane and Humiseal; and cleaning substances such as thinners*  
 26 *and isopropyl alcohol. He reported this issue to his supervisor to no avail.*” (UF  
 27 39 (emphasis added).) In particular, he was upset that the safety features of the  
 28

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1 PVA 350 were being bypassed which he determined was “hazardous”:

2 So sometimes you have to open it. And in normal conditions, it should have  
3 shut down, not allow you to work on the machine. But somebody will  
4 *bypass the safety switch.*

5 Q. So what does that mean? The machine would operate while –

6 A. While you open it, while it’s still open, *which is hazardous*. But that’s  
7 the way they work.

8 (UF 40 (emphasis added).) He also told his toxicologist that “my employer bypass  
9 the safety switch” on this equipment. (UF 41.) After reporting this issue to his  
10 employer, he also asked SpaceX to “upgrade” the PVA 350 which he felt should  
11 “have the alarm to know when the suction was working or not” which was  
12 necessary “to advise the operator that the suction system was not working or  
13 pulling all of the fumes out of it.” (UF 42.) As far as he knew, SpaceX never  
14 addressed any of his concerns. (UF 43.) Eventually, he purchased a “separate  
15 standalone filtration system” for the conformal coating area “because the fumes can  
16 be pretty strong.” (UF 44.) Humiseal thinner, which he reportedly handled on a  
17 daily basis, was both a cleaning agent and a conformal coating material. (UF 45.)  
18 On a medical-intake form, he stated that he worked with the Arathane and  
19 Humiseal products for 4-5 hours every day, which caused headaches, dizziness,  
20 nausea, eye irritation and tiredness. (UF 46.)

21 Then in January, 2013, he was diagnosed with a brain aneurysm and had  
22 brain surgery. (UF 47.) Due to his illness and surgery, Ruben Juarez missed 33.6  
23 weeks of work in 2013 and did not return to work after taking a third medical leave  
24 on March 26, 2014. (UF 48.)

## 25 F. The Workers’ Compensation Action

26 Plaintiff filed his workers’ compensation action on September 24, 2014,  
27 claiming his headaches and aneurysm were caused by “repetitive and continuous  
28 exposure” to toxic substances. (UF 49.) On February 3, 2015, he told Neurologist

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1 Isaac Regev, M.D. that “almost from the beginning he noted frequent headaches at  
 2 work and he believed they were associated with chemicals used to clean electrical  
 3 parts.” (UF 50.) He admitted at his deposition in this action that by this time he  
 4 suspected his headaches and other symptoms were caused by “toxic exposure.”  
 5 (UF 51.) These cleaning agents included Humiseal thinner 521 which he used to  
 6 “soak parts to be cleaned” and to “flush equipment” (UF 52), but he also used this  
 7 thinner as a conformal coating material in the PVA 350. (UF 53.) Humiseal  
 8 thinner 521 was the only “thinner” Juarez used at SpaceX (UF 54), and it is also the  
 9 only thinner plaintiffs allege Juarez used in the PVA 350. (UF 55.)

10 In his February 3, 2015 report, Dr. Regev recommended Juarez should be  
 11 “seen by a toxicologist with the MSDS and working environment analysis.” (UF  
 12 56.) On March 3, 2015, Juarez emailed Jane Malubag in SpaceX’s human  
 13 resources department to get copies of the MSDS sheets for “1. Arathane two part  
 14 mix. 2. Thinner 521. 3. 63/67 Eutectic solder wire. 4. Humiseal 1A33 conformal  
 15 coating. 5. Isopropyl alcohol (IPA).” (UF 57.) These MSDS sheets were then  
 16 provided to Ruben Juarez’s workers’ compensation attorneys. (UF 58.)<sup>1</sup> Plaintiffs  
 17 allege that it was not until then that Juarez “first suspected that the PVA 350 might  
 18 have caused his injuries.” (UF 60.)<sup>2</sup>

19 **G. SpaceX’s MSDS Sheets**

20 The MSDS sheets for all chemicals used in the conformal coating rooms,  
 21 including Humiseal and Arathane, were accessible on the computer Juarez used at  
 22 his workstation and in a three-ring binder kept 3-4 feet from the PVA 350. (UF  
 23 62.) SpaceX complied with its own internal rules which required MSDS sheets to

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24  
 25 <sup>1</sup> Copies of the MSDS sheets plaintiff received are attached to this motion as Exhibits 48 through  
 26 55. (UF 59.)

27 <sup>2</sup> In their original complaint filed in the state court action, plaintiffs alleged that “[p]laintiff  
 28 RUBEN JUAREZ did not suspect that *the chemicals* may have caused his injuries until March of  
 2015 when he, for the first time, received the *MSDS of the chemicals*.” (UF 61 (emphasis  
 added).)

1 “be readily accessible to employees in their work area during all work shifts.” (UF  
 2 63.) The MSDS sheets were also accessible on at least 14 to 18 different computers  
 3 located inside and outside the conformal coating rooms where Mr. Juarez worked.  
 4 (UF 64.) Juarez consulted the MSDS sheets for Humiseal and Arathane to create  
 5 experimental and test batches of these materials when SpaceX created the formula  
 6 it started using in PVA’s machine in 2012. (UF 65.) On January 20<sup>th</sup>, 2012, Juarez  
 7 successfully completed SpaceX’s training course entitled “Hazard Communication”  
 8 during which he was taught that SpaceX’s MSDS sheets were “readily accessible to  
 9 employees in their work area during all work shifts” and were also “always  
 10 available in our online archive as well as in the big blue MSDS books in the kitchen  
 11 area.” (UF 66.) Throughout this time period up until the complaint was filed,  
 12 MSDS sheets, including for Arathane and Humiseal products, could be downloaded  
 13 from multiple websites online. (UF 67.)

14 In spite of all this, Juarez testified that he could not remember ever seeing the  
 15 MSDS sheets, or asking to see the MSDS sheets, when he worked at SpaceX. (UF  
 16 68.)

17 **H. Plaintiffs’ Efforts To Determine The Cause of Juarez’s Headaches  
 18 and Other Symptoms**

19 In interrogatories, PVA asked plaintiffs to “DESCRIBE in detail everything  
 20 YOU did to determine what caused [plaintiffs’] injuries which are alleged in the  
 21 COMPLAINT . . . including but not limited to any investigation, research, internet  
 22 research, questions, and communications.” (UF 69.) As used in the interrogatory,  
 23 the term “YOU” was defined as plaintiffs Ruben Juarez and Isela Hernandez, and  
 24 “anyone acting on [their] behalf, including, but not limited to, attorneys,  
 25 investigators, insurers, and any other agents.” (UF 70.) In response to these  
 26 interrogatories, plaintiffs admitted that the only investigation they did was: “going  
 27 to see his doctors.” (UF 71.) PVA also asked plaintiff Isela Hernandez to identify  
 28 the injuries she suffered which are the basis for her loss of consortium claim

1 including “the date(s) the injury took place.” (UF 72.) In response, plaintiff  
 2 Hernandez stated that her “loss of love, care [and] companionship” was  
 3 “derivative” of her husband’s claim, and she could not otherwise say when her  
 4 particular injuries took place. (UF 73.)

5 PVA also asked plaintiffs to list all “EVIDENCE” which “establishes or in  
 6 any way relates to whether plaintiffs’ lawsuit is barred by the two-year statute of  
 7 limitations.” (UF 74.) “EVIDENCE” was defined as “any facts, witnesses  
 8 (including contact information), statements, video, pictures, photos, recordings,  
 9 documents, writings, depositions, transcripts, interviews, data, compilations,  
 10 reports, productions and any other evidence of any kind whatsoever.” (UF 75.) In  
 11 response, plaintiffs identified only “[p]laintiff’s medical records, the MSDS of the  
 12 pertinent chemicals, and the email from Plaintiff to his HR, asking for a disclosure  
 13 of the MSDS” as well Mr. Juarez’s two days of deposition testimony with exhibits  
 14 in this case, and PVA’s document production. (UF 76.)<sup>3</sup>

### 15 **I. Plaintiffs’ Lawsuit**

16 On February 28, 2017, plaintiffs filed their state court action that PVA  
 17 removed to this Court. (UF 78.) In the operative complaint, plaintiffs allege that  
 18 the PVA 350 caused Juarez to be exposed to Arathane and Humiseal because it did  
 19 not “sound an alarm” or provide a warning “when the ventilation/exhaust is not in  
 20 operation,” and that defendant PVA “trained” Juarez “to stick his head into the  
 21 spraying chamber of the conformal coating machine.” (UF 79.) Other than  
 22 undisclosed communications with his attorneys, Juarez testified at his deposition  
 23 that he had no information to explain why he waited until February 27, 2017 to file  
 24 his lawsuit in this case. (UF 80.)

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<sup>3</sup> Plaintiff Juarez asserted legal objections to the above interrogatories based on the attorney-client privilege and work product doctrine, but the only evidence withheld on this or any other ground was plaintiffs’ attorney’s personal “notes from speaking with the clients and witnesses.” (UF 77.)

## II. POINTS AND AUTHORITIES

## A. Standard for Summary Judgment

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a); *see* Committee Notes on 2010 Amendment to Rule 56 (“‘Shall’ is restored to express the direction to grant summary judgment. . . . Restoring ‘shall’ avoids the unintended consequences of any other word.”) A motion for summary judgment serves to “pierce” the pleadings by putting the non-moving party to the test of affirmatively coming forward with sufficient evidence to support its claims at trial. *Celotex v. Catrett*, 477 U.S. 317, 322-323 (1986) (“[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”); *see also* *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 (9<sup>th</sup> Cir. 2000)(holding plaintiff could not oppose summary judgment based on a factual theory not asserted in discovery because that “would prejudice the defendant.”)

The moving defendant bears the “initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. On issues where the plaintiff bears the burden of proof at trial, the moving defendant has no initial evidentiary burden and must only, through argument, establish an absence of evidence in the record to support the plaintiff’s case. *Id.* at 325.<sup>4</sup> Where the moving defendant

<sup>4</sup> This is in contrast with California state law which arguably places an initial burden of production on the moving defendant. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531-33 (9<sup>th</sup> Cir. (Cal.) 2000) (rejecting *Scheiding v. Dinwiddie Construction Company*, 69

1 meets that initial burden, the burden shifts to the plaintiff to provide “significant  
 2 probative evidence” to establish the existence of a genuine issue of material fact for  
 3 trial. *In re Lewis*, 97 F.3d 1182, 1187 (9<sup>th</sup> Cir. 1996); *Anderson v. Liberty Lobby, Inc.*,  
 4 *supra*, 477 U.S. 242, 249-50 (1986). Plaintiffs may not oppose summary  
 5 judgment based on “conclusory allegations, empty rhetoric, unsupported  
 6 speculation, or evidence which, in the aggregate, is less than significantly  
 7 probative.” *Rogan v. City of Boston* 267 F.2d 24, 27 (1<sup>st</sup> Cir. 2001); *Taylor v. List*,  
 8 880 F.2d 1040, 1044 (9<sup>th</sup> Cir. 1989)(accord).) And although the non-moving party  
 9 should be afforded inferences based on evidence in the record, those inferences  
 10 must be reasonable: “When opposing parties tell two different stories, one of which  
 11 is blatantly contradicted by the record, so that no reasonable jury could believe it, a  
 12 court should not adopt that version of the facts for purposes of ruling on a motion  
 13 for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Nilsson, Robins, Dalgren, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538,  
 14 1542 (9<sup>th</sup> Cir. 1988) (“The record made on summary judgment controls, not that  
 15 record plus speculative inferences a trier of fact might add.”)  
 16

17 **B. Summary Judgment Should Be Granted Because Plaintiffs’ Lawsuit Is  
 18 Barred By California’s Two-Year Statute Of Limitations.**

19 California has a two year limitations period in both the statute governing  
 20 toxic exposure suits, Cal. Code of Civil Procedure (“C.C.P.”) section 340.8, and the  
 21 general product liability statute, C.C.P. section 335.1. Under section 340.8, toxic  
 22 exposure suits must be filed within “two years from the date of the injury, or two  
 23 years after the plaintiff becomes aware of, or reasonably should have become aware  
 24 of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a  
 25 reasonable person on inquiry notice that the injury was caused or contributed to by  
 26 the wrongful act of another, whichever occurs later.” (C.C.P. § 340.8(a).) Under

27 \_\_\_\_\_  
 28 Cal.App.4<sup>th</sup> 64, 72 (1999) as “different in relevant respects from the standard under Fed.R.Civ.P.  
 56.”)

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1 the general product liability statute, section 335.1, plaintiffs must file suit within  
 2 “two years” after plaintiffs “have reason to suspect that a type of wrongdoing has  
 3 injured them.”<sup>5</sup>

4       This deadline is subject to California’s “delayed discovery” rule, *Gonzales v.*  
 5 *Texaco, Inc.*, 2007 WL 4044319, \*7 (Cal. Ct. App. 2007) (“Section 340.8(a)  
 6 codified the discovery rule”), which is an “exception” to the affirmative defense of  
 7 the statute of limitations. *Grisham v. Phillip Morris U.S.A., Inc.*, 40 Cal.4<sup>th</sup> 623,  
 8 634 (2007); *NBCUniversal Media, LLC. v. Superior Court*, 225 Cal.App.4<sup>th</sup> 1222,  
 9 1232 (2014). Because it is an exception, it is plaintiffs’ burden to establish the  
 10 delayed discovery rule applies. *NBCUniversal, supra*, 225 Cal.App.4<sup>th</sup> at 1232  
 11 (holding plaintiffs “have the burden of demonstrating their entitlement to delayed  
 12 accrual of their causes of action.”); *Migliori v. Boeing*, 114 F.Supp.2d 976, 982  
 13 (C.D. Cal. 2000) (“The plaintiff has the burden of showing that the discovery rule  
 14 applies.”); *Bernson v. Browning-Ferris Indust. Of Cal., Inc.*, 7 Cal.4<sup>th</sup> 926, 937  
 15 (1994) (promulgating new “standards emphasizing the burden on the plaintiff to  
 16 demonstrate reasonable diligence.”).<sup>6</sup>

17       Pursuant to the delayed discovery rule, a cause of action will not accrue until  
 18 the plaintiff “has ‘notice or information of circumstances to put a reasonable person  
 19 on inquiry’; he need not know the ‘specific ‘facts’ necessary to establish’ the cause

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20       <sup>5</sup> *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4<sup>th</sup> 797, 807 & 809, fn. 4 (2005); *see also Clark v.*

21 *Prud. Ins. Co.*, 940 F.Supp.2d 186, 203-204 (D. N.J. 2013) (discussing *Fox*); *Pooshs v. Altria*  
 22 *Group, Inc.*, 331 F.Supp.2d 1089, 1092 (N.D. Cal. 2004) (“In California, product liability claims  
 23 are subject to a two-year statute of limitations. Cal. Civ. P. Code § 335.1.”) Section 335.1  
 24 arguably applies to this case because PVA did not sell the allegedly “toxic substances” but a  
 25 machine that plaintiff’s employer used with those substances. There is no case which decides this  
 26 issue but it “makes no difference,” *Nelson v. Indevus Pharmaceuticals, Inc.*, 142 Cal.App.4<sup>th</sup>  
 27 1202, 1209, fn. 7 (2006), because “the analysis is the same under either two-year limitations  
 28 period.” *Riggs v. 7-H Tech. Serv. Group, Inc.*, 2006 WL 1720432, \*3 (Cal. Ct. App. 2006.);  
*Viramontes v. Pfizer, Inc.*, 2015 9319497, \*6, fn. 8 (Cal. Ct. App. 2015) (accord); *Meadows v.*  
*Laci Le Beau Corp.*, 2009 WL 2875344, \*4 (Cal.Ct.App. 2009) (accord).

2       <sup>6</sup> *See also, e.g., Net-Com Services, Inc. v. Eupen Cable USA, Inc.*, 2013 WL 12131179, \*5 (C.D.  
 3 Cal. 2013) (accord); *Wilson v. Irwin*, 2017 WL 6048209, \*5 (Cal. Ct. App. 2017) (accord).

1 of action.” *Norgart v. Upjohn Co.*, 21 Cal.4<sup>th</sup> 383, 398 (1999) (citation omitted).

2 As the California Supreme Court has explained:

3 Under *Jolly [v. Eli Lilly & Co.]*, 44 Cal.3d 1103 (1988)], which relies on  
4 decisions such as *Gutierrez* and *Sanchez*, the plaintiff discovers the cause  
5 of action when he at least suspects a factual basis, as opposed to a legal  
6 theory, for its elements, even if he lacks knowledge thereof — when,  
7 simply put, he at least ‘suspects ... that someone has done something  
8 wrong” to him (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110),  
9 ‘wrong’ being used, not in any technical sense, but rather in accordance  
10 with its ‘lay understanding’ (*id.* at p. 1110, fn. 7). He has reason to  
11 discover the cause of action when he has reason at least to suspect a factual  
12 basis for its elements. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.)  
13 He has reason to suspect when he has ‘notice or information of  
14 circumstances to put a reasonable person on inquiry’ (*id.* at pp. 1110–1111,  
15 italics in original); he need not know the ‘specific ‘facts’ necessary to  
16 establish’ the cause of action; rather, he may seek to learn such facts  
17 through the ‘process contemplated by pretrial discovery’; but, within the  
18 applicable limitations period, he must indeed seek to learn the facts  
19 necessary to bring the cause of action in the first place — he ‘cannot wait  
20 for’ them ‘to find’ him and ‘sit on’ his ‘rights’; he ‘must go find’ them  
21 himself if he can and “file suit” if he does (*id.* at p. 1111).

22 *Norgart, supra*, at 397-398 (parallel citations omitted); *See Legis. Hist. of C.C.P. §*  
23 *340.8, Stats.2003 c. 873 (S.B.331), § 1 (intent to codify Jolly, supra and Norgart,*  
24 *supra.*)

25 Importantly, a plaintiff’s actual (or purported) ignorance of his claims is  
26 irrelevant so long as “sufficient facts” are known which would “put a *reasonable*  
27 *person on inquiry notice.*” C.C.P. § 340.8 (emphasis added). “Subjective suspicion  
28 is not required. If a person becomes aware of facts which would make a reasonably

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1 prudent person suspicious, he or she has a duty to investigate further and is charged  
 2 with knowledge of matters which would have been revealed by such an  
 3 investigation.” *McCoy v. Gustafson*, 180 Cal.App.4th 56, 108 (2009).<sup>7</sup>

4 In *Treatt USA v. Superior Court*, 2015 WL 5895495 (Cal. Ct. App. 2015),  
 5 plaintiff Linares worked as “compounder” at a food flavoring plant which used  
 6 chemicals manufactured by defendant Treatt USA, Inc. (“Treatt”) *Id.*, at \*1. From  
 7 1986 to 2011, he was exposed to Treatt’s chemicals, including “diacetyl.” *Ibid.* By  
 8 2009, doctors determined Linares had “obstructive lung disease” possibly caused by  
 9 his “occupational exposure to toxins.” *Id.*, at \*8, and \*13, fn. 11. He was  
 10 prescribed albuterol and a QVAR inhaler to treat “any possible underlying  
 11 component of occupational asthma,” and told to wear a mask and avoid the areas of  
 12 the plant where chemicals were mixed. *Id.*, at \*3-\*4. On June 20, 2012, more than  
 13 two years later, plaintiff and his wife sued Treatt for selling diacetyl which caused  
 14 his lung disease, Bronchiolitis Obliterans. *Id.*, at \*1.

15 Treatt moved for summary judgment arguing plaintiffs’ lawsuit was barred  
 16 by the two-year statute of limitations in C.C.P. § 340.8. *Ibid.* Plaintiffs argued that  
 17 although Linares knew he could have been injured by “exposure to production  
 18 chemicals” he could “not recall being told to avoid any particular chemical, or

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19  
 20 <sup>7</sup> See also *Treatt USA v. Superior Court*, 2015 WL 5895495, \*8 (Cal. Ct. App. 2015) (holding  
 21 cause of action accrues “even if the plaintiff himself is subjectively oblivious”); see also *Mangini*  
 22 *v. Aerojet-General Corporation* 230 Cal.App.3d 1125, 1150 (1991) (accord; superseded by  
 23 statute on different grounds.) “As a result, even ‘a plaintiff who did not actually know that his  
 24 rights were violated will be barred from bringing his claim after the running of the statute of  
 25 limitations, if he should have known in the exercise of due diligence.’” *Simpson v. Robert Bosch*  
 26 *Tool Corp.*, 2014 WL 985067, \*4 (Cal. Ct. App. 2014) (citation omitted).

27 By requiring knowledge that a wrongful act was committed by “another,” section 340.8 also  
 28 codified the longstanding rule that a cause of action accrues even when the identity of the  
 defendant is unknown: “[T]he plaintiff may discover, or have reason to discover, the cause of  
 action even if he does not suspect, or have reason to suspect, the identity of the defendant . . .  
 because the identity of the defendant is not an element of any cause of action.” *Norgart, supra*, 21  
 Cal.4<sup>th</sup> at 399 (relying on C.C.P. § 474 which requires plaintiffs to sue unknown defendants as  
 “Does.”)

1 specifically to avoid diacetyl.” *Id.*, \*4. Linares also testified that he never  
2 suspected “anyone had done anything wrong to cause him lung injury” until “2012,  
3 when a doctor told him ‘he needed to get professional help for compensation for his  
4 injury.’ *Id.*, at \*5, \*12. “Linares never recall[ed] any doctor identifying his lung  
5 condition by name [and] still does not clearly understand the nature of his lung  
6 condition.” *Id.*, at \*5, \*12.

When the trial court denied summary judgment, Treatt petitioned the appellate court for a peremptory writ of mandate which was granted. *Id.*, \*14. That court held “that no later than April 2009 . . . Linares was or reasonably should have been aware he had sustained appreciable lung injury caused, *at least in part, by occupational exposure to toxins*, and that a reasonable person in Linares’ position would suspect or should have suspected wrongdoing. Thus, the two-year limitation period expired before the action was filed on June 20, 2012.” *Id.*, at \*8 (emphasis added). The Court found plaintiffs’ claims, that Linares must actually know diacetyl caused his injuries and that he had a specific lung disease, to be “legally irrelevant.” *Id.*, \*10, \*14; *see also Miller v. Lakeside Village Condominium Assn.*, 1 Cal.App.4th 1611 (1991) (discussed *infra*).<sup>8</sup>

19       <sup>8</sup> The appellate court also distinguished *Rosas v. BASF Corporation*, 236 Cal.App.4<sup>th</sup> 1378 (2015)  
20 because in that case it was disputed whether the plaintiff suspected his disease was caused by  
21 “workplace exposure.” *Treatt USA, Inc., supra*, at \*11; *see also Rosas, supra*, at 1399 (“Rosas  
22 produced evidence that neither he nor his doctor definitively suspected a *workplace chemical*  
23 *exposure* as a cause of his disease.” (emphasis added).) The factual dispute in *Rosas* was created  
24 because Rosas’ doctors had assured him that “chemical exposure [was] not causing his underlying  
25 disease.” *Rosas, supra*, at 1396. In both *Rosas* and *Treatt USA, Inc.*, the courts held that such a  
26 dispute was automatically eliminated by the filing of a workers’ compensation action “based on  
27 exposure to toxic chemicals” because that “constituted further ‘definitive proof that he had a  
28 suspicion that ‘someone ha[d] done something wrong to [him]’ long before [he filed] his civil  
complaint.’” *Treatt USA, Inc., supra*, at \*9 fn. 10 (quoting *Rivas, infra*, 98 Cal.App.4<sup>th</sup> at 229);  
*Rosas, supra*, 236 Cal.App.4<sup>th</sup> at 1386, fn. 5, 1391 (quoting *Rivas*), 1397-99. *See also Maldonado  
v. Medivators, Inc.*, 2017 WL 2774347, \*10 (Cal. Ct. App. 2017) (further distinguishing *Rosas*  
because the chemicals plaintiff worked with, food flavorings, had at that time not yet been  
“recognized as being hazardous.”)

1           In *Rivas v. Safety Kleen Corp.*, 98 Cal.App.4th 218 (2002), the court upheld a  
 2 grant of summary judgment based on the former one-year statute of limitations<sup>9</sup>  
 3 where the plaintiff believed his kidney injuries were caused by a solvent used at his  
 4 job. *Id.*, 223. After receiving a kidney transplant in 1995, plaintiff consulted a  
 5 workers' compensation attorney in September, 1996 to investigate the possibility  
 6 that this solvent caused his kidney damage. *Ibid.* That same month, and more than  
 7 a year before filing suit, he filed a workers' compensation action claiming his  
 8 kidney disease was caused by workplace exposure to toxic fumes, gases, and  
 9 liquids. *Id.*, 224.

10           Plaintiff argued the accrual of his cause of action was tolled until he was  
 11 “explicitly informed” that defendant’s “product caused the medical disorder” after  
 12 he provided a “list of chemicals” to his workers’ compensation doctor, or until he  
 13 “had an opportunity to personally review medical records specifying the cause of  
 14 the disorder.” *Rivas, supra*, 98 Cal.App.4th at 223, 228. This argument was  
 15 rejected and the appellate court concluded that even if plaintiff’s doctors’  
 16 conclusions were “ambiguous” regarding the cause of his injuries, and insufficient  
 17 to “arouse a reasonable person’s suspicion[,] the fact that he filed a workers’  
 18 compensation claim . . . *based on exposure to toxic chemicals at work is definitive*  
 19 *proof* that he had a suspicion that ‘someone ha[d] done something wrong to [him]’  
 20 long before his civil complaint was filed.” *Rivas, supra*, at 228-229 (emphasis  
 21 added).

22           In *Norgart v. Upjohn Co.*, 21 Cal.4<sup>th</sup> 383 (1999), the California Supreme  
 23 Court held that defendant Upjohn was entitled to summary judgment based on the  
 24 statute of limitations where the plaintiff suspected his daughter’s suicide was

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25  
 26           <sup>9</sup> In 2003, California’s statute of limitations for personal injury suits was amended to extend the  
 27 limitations period from one to two years but has otherwise not been amended. *See CCP § 335.1,*  
 28 *Credits; 2002 Cal. Legis. Serv. Ch. 448 (S.B. 688)* (discussed in *Maldonaldo v. Harris*, 370 F.3d  
 945, 954 (9<sup>th</sup>. Cir. (Cal.) 2004); *see also Miller, infra*, 1 Cal.App.4<sup>th</sup> at 1624 (also applying prior  
 1-year limitations period).)

1 caused by her psychiatrist's negligent prescription of "Halcion," defendant's drug,  
 2 and the physical abuse by her husband, both of which occurred more than four  
 3 years before plaintiff filed suit. *Id.*, 406-407. Upjohn, the manufacturer of Halcion,  
 4 was not required to show that the plaintiff suspected its drug was defective so long  
 5 as he suspected the suicide was wrongfully caused by "someone": "He thereby  
 6 expressly admitted – to quote *Jolly* again – that he 'suspect[ed] ... that someone,'  
 7 indeed two specific persons, 'ha[d] done something wrong' to cause her death."  
 8 *Norgart*, *supra*, 21 Cal.4th at 406 (quoting *Jolly*, *supra*, 44 Cal.3d at 1110; ellipses  
 9 in original.)

10 In *Miller v. Lakeside Village Condominium Assn.*, 1 Cal.App.4th 1611  
 11 (1991), the appellate court affirmed summary judgment based on the former one-  
 12 year statute of limitations because it was undisputed that plaintiff suspected her  
 13 injuries were caused by exposure to mold more than one year before filing suit. *Id.*,  
 14 1624. There was also undisputed evidence that plaintiff was hospitalized for  
 15 asthma and learned her condominium was contaminated with mold approximately  
 16 two years before filing suit. *Id.*, 1616-1617. Plaintiff argued the statute was tolled  
 17 until she was diagnosed with immune dysregulation, the underlying medical  
 18 condition which caused her asthma but the appellate court determined this was  
 19 irrelevant: "She cites no authority for the proposition that a cause of action cannot  
 20 accrue until a plaintiff can attach a medical diagnosis, whether correct or incorrect,  
 21 to her condition, even though plaintiff suffers harm and is aware of its negligent  
 22 cause." *Miller*, *supra*, 1 Cal.App.4th at 1625. The court concluded plaintiff's  
 23 lawsuit was barred because "reasonable minds can draw only one conclusion" that  
 24 more than one year before filing suit, the plaintiff "suffered appreciable and actual  
 25 harm ... and was also aware of its negligent cause." *Id.* at 1624.

26 Here, plaintiff Juarez admitted that in January or February of 2012, two  
 27 weeks after starting at SpaceX, he was exposed to toxic materials from PVA's  
 28 machine. A few months later, he developed migraine headaches, dizziness,

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1 difficulty walking and sinus symptoms *which he personally attributed to exposure*  
 2 *to chemical coating materials Arathane and Humiseal*. Then, starting in June,  
 3 2012, he allegedly had over 9 hospitalizations and at least 21 visits to urgent  
 4 care/emergency room for symptoms associated with toxic chemical exposure. He  
 5 reported these issues to SpaceX who he felt should not have bypassed the  
 6 machine's safety mechanisms and should have required an alarm system to prevent  
 7 workers from using it without adequate ventilation. He even purchased an air  
 8 filtration system to reduce the exposure to these fumes by SpaceX employees.  
 9 Plaintiffs' lawsuit therefore accrued no later than October, 2012, which is the very  
 10 latest he could have first suspected someone "had done something wrong" to cause  
 11 his injuries. UF 35-46; *Norgart, supra*, 21 Cal.4<sup>th</sup> at 406 (quoting *Jolly, supra*, 44  
 12 Cal.3d at 1110); *see also Fox, supra*, 35 Cal.4<sup>th</sup> at 808-809 (holding "a potential  
 13 plaintiff who suspects that an injury has been wrongfully caused must conduct a  
 14 reasonable investigation of *all potential causes* of that injury." (emphasis added).)

15 In fact, Ruben Juarez never wondered what caused his injuries. He genuinely  
 16 believed the PVA 350 was responsible because it did not have "an alarm" and there  
 17 was nothing "to advise the operator that the suction system was not working or  
 18 pulling all of the fumes out of it," which is the same factual theory his attorneys  
 19 alleged against PVA in their complaint.<sup>10</sup>

20 But that is not all. Because his headaches and related symptoms were totally  
 21 disabling, Juarez stopped working at SpaceX in March, 2014 which was the last  
 22 time he was employed by anyone. Then in September, 2014, he filed his workers'  
 23 compensation action for workplace "exposure to toxic chemicals" which under

---

24  
 25 <sup>10</sup> Like the plaintiff in *Norgart* whose lawsuit against Upjohn accrued when he first suspected his  
 26 injuries were caused by the negligence of his daughter's psychiatrist who prescribed Upjohn's  
 27 drug, plaintiffs' lawsuit against PVA accrued when Juarez first suspected his injuries were caused  
 28 by the negligence of his employer, SpaceX who caused his alleged exposure to toxic chemicals  
 with PVA's machine. *Norgart, supra*, 21 Cal.4<sup>th</sup> at 406; *see also Navajo Nation v. U.S. Forest  
 Serv.*, 535 F.3d 1058, 1080 (9<sup>th</sup> Cir. 2008) (prohibiting parties from opposing summary judgment  
 based on factual theories not alleged in the complaint.)

1 California law is “definitive proof that he had a suspicion that ‘someone ha[d] done  
 2 something wrong to [him]’ long before his civil complaint was filed.” *Rivas, supra*,  
 3 98 Cal.App.4<sup>th</sup> at 229.<sup>11</sup> The chemicals he alleged in that action even included  
 4 Humiseal thinner, which is one of the materials he used in PVA’s machine.

5 The undisputed evidence also proves that plaintiffs did nothing to investigate  
 6 the cause of their injuries, even after Juarez expressed his concerns about Humiseal,  
 7 Arathane and the PVA 350 to his employer in 2012 and after filing his workers’  
 8 compensation action for toxic chemical exposure in September, 2014. (UF 38-39,  
 9 49, 69-71.) By definition, plaintiffs’ actions fail to establish the “diligence”  
 10 necessary to avoid the statute of limitations. “This duty to be diligent in  
 11 discovering facts that would delay accrual of a cause of action ensures that  
 12 plaintiffs who do ‘wait for the facts’ will be *unable to successfully avoid summary*  
 13 *judgment against them on statute of limitations grounds.*” *Heimuli v. Lilja*, 2012  
 14 WL 2520907, \*6 (Cal. Ct. App. 2012) (emphasis added; citation omitted).

15 The fact that in March, 2015 SpaceX produced MSDS sheets to Juarez’s  
 16 attorneys is irrelevant, because plaintiffs are not permitted to “wait for facts to find  
 17 them” and “sit on their rights.” *Ultimax Cement Mfg. Corp. v. Quikrete*  
 18 *Companies, Inc.*, 2009 WL 4307082, \*4 (Cal. Ct. App. 2009) (quoting *Jolly v. Eli*  
 19 *Lilly & Co.* 44 Cal.3d 1103, 1111 (1988).) The MSDS sheets were always  
 20 available at SpaceX either from SpaceX’s online database on plaintiff’s computer  
 21 or in the three-ring binder nearby. There was also nothing to prevent him or his  
 22 attorneys from obtaining them once he left SpaceX, or simply downloading them  
 23 from the internet. Plaintiffs’ reliance on the MSDS sheets fails because plaintiffs  
 24 are not only held to their “actual knowledge,” but to any “sources” of knowledge  
 25 that are reasonably available. *Jolly, supra*, 44 Cal.3d 1103 at 1109; *Treatt USA*,

26 \_\_\_\_\_  
 27 <sup>11</sup> It is also important that there is no evidence that Juarez’s doctors assured him chemical  
 28 exposure *was not* the cause of his injuries. *See, e.g., Rosas, supra*, 236 Cal. App.4th at 1396  
 (discussed *infra*). This would have been impossible because, as he admitted, none of his doctors  
 were informed that he was “working with chemicals.” (UF 81.)

1 *Inc., supra*, at \*12 (accord).

2 Plaintiffs will most likely argue that Juarez's failure to remember seeing the  
 3 MSDS sheets at SpaceX creates a dispute of material fact. (Catalona Dec., Ex. 30,  
 4 191:22-23, 192:13-18, 194:5-7.) Not true. Considering they were kept on his work  
 5 computer and in a binder nearby, and that he actually used them as part of his job,  
 6 and because he passed a "Hazard Communication" course which taught him they  
 7 were "readily accessible to employees in their work area," the Court should not  
 8 consider plaintiffs' version of events which "no reasonable jury could believe"  
 9 because it is "utterly discredited by the record." *Scott v. Harris*, 550 U.S. 372, 380  
 10 (2007). But even if this story were considered, it does not create a dispute of  
 11 material fact because Juarez never actually disputed the MSDS sheets were  
 12 available. (Catalona Dec., Ex. 30, 192:13-18, 194:5-7.) Although he testified that  
 13 he could not *remember seeing them*, the fact that they were available remains  
 14 undisputed: "In sum, Linares does not actually claim he never received or  
 15 understood the communications he received from anyone from National Jewish  
 16 [Hospital], *only that he 'does not recall' doing so*. But Linares's lack of  
 17 recollection does not constitute affirmative evidence raising a triable issue  
 18 *concerning Treatt's evidence* that he did receive and understand the  
 19 communications." *Treatt USA, Inc., supra*, 2015 WL 5895495, \*12 (emphasis  
 20 added); *see also Jolly, supra*, 44 Cal.3d at 1109 (imputing knowledge reasonably  
 21 discoverable from available "sources.")

22 Plaintiffs may also suggest that it is somehow PVA's burden to prove  
 23 plaintiffs are *not* entitled to benefit from the discovery rule because that rule is now  
 24 codified in section 340.8 and is thus an "element" of that particular statute of  
 25 limitations, an affirmative defense. This is incorrect. Plaintiffs' argument has been  
 26 uniformly rejected because the discovery rule is an "exception" to the statute of  
 27 limitations, and is therefore the plaintiffs' burden to prove, regardless of whether its  
 28 source is a statute or the common law. *April Enterprises, Inc. v. KTTV*, 147

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1 Cal.App.3d 805, 833 (1983) (“It is plaintiff’s burden to establish ‘facts showing that  
 2 he was not negligent in failing to make the discovery sooner and that he had no  
 3 actual or presumptive knowledge of facts sufficient to put him on inquiry.’”)  
 4 *Nguyen v. Western Digital Corporation*, 229 Cal.App.4<sup>th</sup> 1522, 1547, 1553 (2014)  
 5 (holding one of the “purposes in enacting section 340.8 was to codify the discovery  
 6 rule in cases involving exposures to hazardous materials and toxic substances”  
 7 which “places the burden on the plaintiff to ‘show diligence.’” “[T]he language of  
 8 section 340.8 is *not intended to create a special discovery rule of accrual* for claims  
 9 predicated on exposure to hazardous substances but rather to clarify that  
 10 California’s traditional discovery rule applies to such claims.” *Tsaturyan v.*  
 11 *Glaxosmithkline, LLC*, 2018 WL 1789379, \*6, fn. 9 (Cal. Ct. App. 2018) (emphasis  
 12 added; quoting *Alexander v. Exxon Mobil*, 219 Cal.App.4th 1236, 1252 (2013));  
 13 *See also Rosas v. BASF Corporation*, 236 Cal.App.4<sup>th</sup> 1378, 1390 (2015) (“The  
 14 Legislature passed section 340.8 to codify for toxic torts the delayed discovery  
 15 rule.”); *Norgart, supra*, 21 Cal.4<sup>th</sup> 383, 397 (placing burden on plaintiffs for  
 16 purposes of the discovery rule whether rule “expressed by the Legislature or  
 17 implied by the courts.”)<sup>12</sup>

18 Plaintiff Isela Hernandez’s claim for loss of consortium is directly dependent  
 19 upon plaintiff Juarez’s claims for negligence and product liability, and thus “stands  
 20 or falls with” those claims. *Leonard v. John Crane, Inc.* 206 Cal.App.4<sup>th</sup> 1274 1288  
 21 (2012); *Meighan v. Shore* 34 Cal.App.4th 1025, 1034-35 (1995) (“Thus, an  
 22 unsuccessful personal injury suit by the physically injured spouse acts as an  
 23 estoppel that bars the spouse who would claim damages for loss of consortium.”);  
 24 *see also Pineda v. Golden Valley Health Centers*, 2012 WL 2617589, \*3 (E.D. Cal.  
 25 2012) (accord); *Treatt USA, Inc., supra*, \*8, fn. 9 (accord). Even if Ms.

26 \_\_\_\_\_  
 27 <sup>12</sup> But even if it were PVA’s burden to *disprove* plaintiffs’ delayed discovery theory, that burden  
 28 is still met by PVA’s undisputed evidence that the MSDS sheets were available and would have  
 been discovered had a reasonable investigation been conducted. *Jolly, supra*, 44 Cal.3d at 1109.

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1 Hernandez's claim is analyzed on its own terms, it is still barred because a loss of  
 2 consortium is legally presumed to accrue on "the date of injury which gives rise to  
 3 the loss of consortium." *Viramontes v. Pfizer, Inc.*, 2015 WL 9319497, \*11 (E.D.  
 4 Cal. 2015.) Plaintiff Hernandez's claim is thus equally untimely because it is  
 5 legally presumed to have accrued when plaintiff Juarez's injuries developed by  
 6 September, 2012 at the latest, and plaintiff Hernandez could provide no evidence  
 7 that her injuries began at any other time.

8 Plaintiffs' claims accrued by either October, 2012 or September, 2014 at the  
 9 absolute latest. Plaintiffs' lawsuit was not filed until February 27, 2017 and is  
 10 therefore barred by California's two-year statute of limitations as a matter of law.  
 11 (C.C.P. § 340.8(a); C.C.P. § 335.1.)

12 **C. Partial Summary Judgment Should Be Granted On Plaintiffs'  
 13 Failure To Warn Claims.**

14 Plaintiffs' failure to warn claims fail as a matter of law because PVA  
 15 unquestionably provided warnings with its machine, and also because its warnings  
 16 could not have caused plaintiffs' injuries as a matter of law because they were  
 17 never read. Here, plaintiffs allege the PVA 350 contained "no warning anywhere"  
 18 about the fact that the machine was "designed to continue to spray chemicals even  
 19 when the ventilation/exhaust is not in operation." (UF 82; Dec. of Catalona, 58:22-  
 20 25, 63:15-25, 64:1-21.) The undisputed evidence proves that this allegation is not  
 21 true. The PVA 350 contained safety features that prevented chemicals from being  
 22 sprayed when its exhaust system was not in operation. PVA's manual explicitly  
 23 warned users (1) never to bypass, disable or tamper with this feature and (2) that  
 24 while the materials used in the machine could be hazardous, those materials came  
 25 with MSDS sheets that specified known dangers and toxicity. The fact that these  
 26 warnings, which were available, were "not on the product" is irrelevant. *Temple v.*  
 27 *Velcro USA, Inc.*, 148 Cal.App.3d 1090, 1094-1095 (1983). Summary judgment  
 28 should be granted on plaintiffs' failure to warn claims because the undisputed

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1 evidence negates the precise factual theory alleged. *Navajo Nation, supra*, 535  
 2 F.3d at 1080 (prohibiting oppositions to summary judgment motions based on  
 3 factual theories not alleged in the complaint.)

4 These claims also fail as a matter of law because Juarez never read the PVA  
 5 manual.<sup>13</sup> “There is no causation when the person to whom the warning is directed  
 6 did not read the warning.” *Contois v. Aluminum Precision Products, Inc.*, 2008 WL  
 7 5065108, \*4 (Cal. Ct. App. 2008); *Ramirez v. Plough, Inc.*, 6 Cal.4<sup>th</sup> 539, 556  
 8 (1993) (unless the warnings are read, there can be “no conceivable causal  
 9 connection between the representations or omissions that accompanied the product  
 10 and plaintiff’s injury”); *Hart v. Robert Bosch Tool Corp.*, 2010 WL 3566715, \*5  
 11 (Cal. Ct. App. 2010) (accord); *Motus v. Pfizer Inc.*, 358 F.3d 659 (9<sup>th</sup> Cir. (Cal.)  
 12 2004)) (holding “the adequacy of Pfizer’s warnings is irrelevant” unless they were  
 13 read.)

14 Plaintiffs’ failure to warn claims therefore fail for two reasons: (1) the  
 15 undisputed evidence negates plaintiffs’ legal theory alleged in the complaint, and  
 16 (2) plaintiffs cannot establish the legal element of causation or that PVA’s warnings  
 17 were inadequate because they admittedly were never read.<sup>14</sup>

18 **D. Partial Summary Judgment Should Be Granted On Plaintiffs’  
 19 Strict Product Liability Cause of Action.**

20 The PVA 350 could have been used with virtually any liquid coating material  
 21 including the non-solvent material, Electrolube’s NVOC, that SpaceX specified  
 22 would be used in the machine when it was sold. Under California law, a product

23 <sup>13</sup> The undisputed evidence also establishes that the PVA manual was available and Juarez was  
 24 explicitly instructed by his employer to use the manual to program PVA’s machine.

25 <sup>14</sup> The MSDS sheets, provided by the third party suppliers of Arathane and Humiseal materials,  
 26 also negate plaintiffs’ failure to warn claims because they contained admittedly adequate  
 27 warnings regarding the toxic nature of those substances, and were at all times reasonably  
 28 accessible on Mr. Juarez’s computer and the three ring binders in his department. *Johnson v.  
 American Standard, Inc.*, 43 Cal.4<sup>th</sup> 56, 61-62 (2008) (HVAC worker’s failure to warn claims  
 against air conditioner manufacturer defeated by warnings contained in available MSDS sheets  
 for refrigerant “R-22,” used in machine.)

1 manufacturer may be held *strictly* liable for an injury producing material used in  
 2 conjunction with its product that it neither manufactured, sold nor supplied, but  
 3 only if the two products must “necessarily” be used “together.” *O’Neil v. Crane*  
 4 *Co.*, 53 Cal.4<sup>th</sup> 335, 361 (2012); *Shields v. Hennessy Industries*, 205 Cal.App.4<sup>th</sup>  
 5 782, 798 (2012) (accord). Strict liability is prohibited even when it is “foreseeable  
 6 that the products will be used together,” unless such use is actually necessary.  
 7 *O’Neil, supra*, 53 Cal.4<sup>th</sup> at 361 (also holding that the lower court had “extend[ed]  
 8 *Tellez-Cordova [v. Campbell–Hausfeld/Scott Fetzer Co.* (2004) 129 Cal.App.4th  
 9 577], beyond its unique factual context” which “could easily lead to absurd results.  
 10 It would require match manufacturers to warn about the dangers of igniting  
 11 dynamite, for example.”)

12 Partial summary judgment should be granted on plaintiffs’ strict product  
 13 liability claim because it is undisputed that PVA did not manufacture, sell, supply  
 14 or specify the Arathane and Humiseal materials which were not necessarily  
 15 required to be used with PVA’s machine.

16 **IV. CONCLUSION**

17 Plaintiffs’ lawsuit is barred in its entirety by the statute of limitations, and  
 18 plaintiffs’ failure to warn and strict products liability claims are separately barred  
 19 pursuant to binding California authority. PVA respectfully requests this Court to  
 20 grant its motion for summary judgment in its entirety.

21  
 22 DATED: August 24, 2018

BECHERER KANNETT & SCHWEITZER

23  
 24  
 25 By: /s/ Alex P. Catalona  
 26 Alex P. Catalona  
 27 Attorneys for Defendant  
 28 PRECISION VALVE & AUTOMATION,  
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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 27, 2018, a true and correct copy of **DEFENDANT PRECISION VALVE & AUTOMATION, INC.'S  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT** has been served via ECF upon all counsel of record in the Court's electronic filing system.

By: /s/ Jerry Dumla

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